UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUGET SOUND ELECTRIC RAILWAY, a corporation,
Plaintiff in Error,
—vs.—
ALEXANDER MATSON,
Defendant in Error.

No. 3092.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISRICT OF WASHINGTON, SOUTHERN DIVISION.

Brief of Defendant In Error.

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PRELIMINARY STATEMENT.

This is an action for damages for injuries received by Alexander Matson, defendant in error (plaintiff below), caused by the negligence of the Puget Sound Electric Railway, plaintiff in error (defendant below). From a verdict and judgment for the plaintiff, the defendant sues out a writ of error to the Circuit Court of Appeals.

THE NEGLIGENCE OF THE DEFENDANT ALLEGED WAS:

1. Starting the train without warning and while the plaintiff had hold of the rods provided for the purpose of assisting and aiding in the boarding of said train.

2. In not permitting the train to remain stationary long enough for plaintiff to board.

3. In not providing means whereby the train would remain stationary long enough for plaintiff to board it.

4. In not providing means by which the motorman or operator of said train was informed and knew that the plaintiff was in the act of boarding.

THE DEFENCE OF THE DEFENDANT WAS:

1. General denial.

2. Contributary negligence,

(a) In boarding the train while in motion.

(b) That neither the *plaintiff nor any other passenger was on the platform at the station.*

(c) That the doors and vestibules of train were closed before plaintiff arrived.

The issues were decided in favor of the plaintiff.

THE STATEMENT OF THE CASE BY PLAINTIFF IN ERROR IS UNFAIR.

1. No question is raised as to the sufficiency of the evidence to support the verdict, yet defendant by its statement has endeavored to make it appear that the evidence was insufficient. For emphasis as to insufficiency he has italicized the matters he calls especial attention to.

2. In settling the statement of facts counsel for defendant stated to the trial judge he had just two questions to raise by writ of error, to-wit, misconduct of counsel, and error in instructions; therefore, only so much of the evidence as was necessary to pass on those alleged errors was permitted in the bill. Now, after the elimination has been made of all testimony, except so much as is necessary for the understanding of the alleged errors, counsel misconstrues the evidence.

The jury passed on the evidence, and the trial judge reviewed the same on motion for a new trial. A case passed on by a federal jury and a federal judge is generally properly decided, at least so far as the issues of fact are concerned.

The whole statement is so unfair that a new statement is necessary.

STATEMENT OF THE CASE.

The Puget Sound Electric Railway, defendant, owns and operates an electric interurban between the cities of Seattle and Tacoma, running approx-

imately 50 passenger trains a day through Pacific City.

On the ~~30~~ 20th day of March, 1915, at about nine p. m., Matson, plaintiff, went into the station at Pacific City for the purpose of taking a train to Tacoma. One train went through on the way to Tacoma, but did not stop. The regular local, 11 o'clock, Tacoma-bound train, came in late, stopped, and let off a passenger. The plaintiff having waited at the depot for about two hours, upon seeing the next train coming, and seeing it was going to stop, stepped out of the depot and down the platform. When the train stopped he went to the front door of the rear car, where the vestibule was open. As he took hold of the handle bars for the purpose of getting on board, the car started suddenly, throwing the plaintiff against the side and partly under the car. The rear wheels ran over his foot, mashing it so badly that amputation of part of the foot was necessary. There was a conductor on each car to assist passengers on and off and to collect fares. Neither conductor got off at the depot at Pacific City to see whether or not any passengers were ready to board the train. The depot and platform were not well lighted. The night was dark and foggy.

After the accident plaintiff crawled over the platform and into the damp, cold depot; took off his sweater and wrapped it around his mangled

and bloody stump to keep it warm. There he lay until his cries brought help.

The train went on through to Tacoma, then started on its return trip to Seattle. As it again approached Pacific City, Seattle-bound, several persons, who had come to assist the plaintiff, flagged the train to stop, but it swept on through, disregarding the flagging and notwithstanding the fact that there were three or more passengers on board bound for Pacific City.

A day or two after the accident defendant altered its platform and depot by raising the platform several inches and by erecting a brilliant cluster of lights near the depot.

No question is raised in this court as to the amount of the verdict. It should have been for a larger amount. Evidently the jurors penalized plaintiff some because of the rebuke of the court administered to his counsel.

Plaintiff's injuries are permanent and serious. The fore part of the foot is gone, leaving nothing but the heel. He still has considerable pain, especially during rainy weather. He will never be able to walk without crutches. He will have to undergo another operation and have his whole foot removed, then get an artificial foot; or else continue to use crutches.

No question is raised as to the sufficiency of the evidence to support the verdict, and therefore the court below, in settling the bill of exceptions, cut from the record all evidence he considered immaterial to the issues to be determined in this court.

ARGUMENT.

An argument hardly seems necessary on the part of the plaintiff (defendant in error).

1st. Defendant (plaintiff in error) assigns as error the overruling of a motion for a new trial. This court will never pass on such an assignment.

2nd. Misconduct of counsel is assigned as error in that counsel spoke to a witness about his testimony on a former trial being false. Counsel was rebuked by the trial court. No exceptions were taken.

3rd. Error is assigned stating that the court gave a wrong instruction. The court instructed on the theory of the defense advanced in its pleadings and on its requested instructions.

4th. Error is assigned in refusing certain instructions. The court gave 26 written instructions, taking 14 pages of the record, covering the case fully. Also he gave several oral instructions. The instructions given included in substance the requested instructions.

While we do not consider further argument necessary we shall discuss briefly the assignments of error.

ASSIGNMENT OF ERROR I.

Counsel contends that the lower court erred in refusing to grant its motion for a new trial. Counsel misconceived the functions of this court. The matter has long been settled that the Circuit Court of Appeals will not consider such an assignment of error. The rule is so well known that we need not cite any authorities to support it.

ASSIGNMENTS OF ERROR II AND III.

AS TO MISCONDUCT OF COUNSEL.

When approached by a witness (M. M. Shull) in an endeavor to explain his discredited testimony given at former trial, counsel for the plaintiff said: "If you lie like you did in the other trial, I have a good notion to have you arrested for perjury," or words to that effect.

The witness told of this conversation on the stand.

The court rebuked counsel, but did not permit any explanation except that the remark was made in good faith, and the matter ended when counsel said, "Well, all I want is the truth, and I cannot see where he is telling the truth."

The witness was a fair sample of a small town witness, eager to attend the trial after seeing his neighbors subpoenaed. Nearly two years after the accident he volunteered his services to the defendant. This was at the time of the first trial. It is not unfair to assume that the claim agents for the company, immediately after the accident, had raked this little town (population 50 or 75) for every one who could testify, but they did not find him until he became anxious to be present out of curiosity.

On the witness stand he testified that he stood in the doorway of a fruit stand or small store 75 or 100 feet away and saw the plaintiff running west to catch the train.

The jury believed his testimony to be false. It was physically impossible on that dark, foggy, Puget Sound night for any person to stand where he said he stood and identify any one at the place where he said plaintiff was. Further, his testimony was contradicted not only by witnesses for the plaintiff, but other witnesses of the defendant. Again he was discredited by his own cross-examination and by his demeanor on the witness stand. It is unfortunate for us that the demeanor of this witness cannot be shown in this court by the record.

Surely, if the jury believed that there was an attempt to procure false testimony or to intimidate

any witness so that he would give untrue testimony, it would have returned the verdict promptly for the railway company.

The witness was not intimidated. He testified fully and freely. He testified so fully and freely that no one in the court room believed him. Counsel, instead of trying to obstruct and impede the due administration of justice, was trying to get at the truth.

No exception was taken by the defendant.

Even if the defendant had taken an exception, what possible error did the court commit? He censured counsel, which fact helped the defendant, instead of injured it. Could the rebuke administered to counsel possibly help the plaintiff? It could have no other effect than prejudice the jury against the plaintiff and his counsel.

No citation of authorities seems necessary, as the alleged error of the trial court is frivolous.

ASSIGNMENT NO. IV.

Defendant objects to part of instruction No. II, relative to the degree of care owed to the plaintiff.

Instruction No. II is as follows:

> "As has been stated to you in the arguments, there is a difference in the degree of care which the defendant, the railroad company,

owes to a passenger, and the degree of care the passenger owes to himself. A common carrier of passengers is bound to the highest degree of care consistent with the practical operation of its road and trains, but before you can apply this rule, and hold the defendant to that high degree of care, *it will be necessary to find by a fair preponderance of the evidence that the plaintiff had become a passenger. It is not every man who is running along the street to catch the train who is a passenger. Before he can be considered a passenger, he must have either gotten upon the train or be in such a position, either mounting the train, or having shown by his conduct that he desired to board the train, has to either be seen by the agents of the common carrier operating a train, and they have to realize that he desires to take the train, or, at least, be in such position and have so indicated his intentions that they should realize it if they were exercising due diligence in keeping a look-out to see who was going to board that train at their regular stop.* But the passenger, and the plaintiff in this case, by the same rule is not held to that high degree of care, but he is bound to exercise ordinary care for his own safety when he attempts to board a train, and if he fails to exercise ordinary care for his own safety, and because of that failure on his part to exercise ordinary care he is injured, why, then, he cannot recover, even though the defendant company or its servants are negligent."

After defendant excepted to the instruction relative to the degree of care that a common carrier owed, then for the first time he claimed plaintiff was a trespasser.

The court then instructed:

"Gentlemen of the Jury: The court did not mean in any way to intimate that the plaintiff was a passenger; whether the plaintiff was a passenger or not, he was bound to exercise ordinary care for his own safety. (Record, p. 57).

"If the train was moving and the vestibule was closed and there was no invitation on the part of the defendant company to encourage the plaintiff in any way to board the car, and he flew at the side of the car, the defendant did not owe him any exercise of ordinary degree of care. All it did owe him was for itself and its servants to refrain from wilfully and purposely injuring the plaintiff." (Record, p. 58).

Point I.

The defendant made no claim in its pleadings, nor in its evidence, nor in its argument that the plaintiff was a trespasser. It tried the case on the theory that the plaintiff was a passenger guilty of contributory negligence. It pleaded (Record, page 7, lines 4 and 5) *"that neither the plaintiff nor any other passenger was on the platform."*

Also, in its requested instruction No. III (Record, page eleven), it refers to the plaintiff as a passenger in the following language, *"that neither the plaintiff nor any other passenger was on the platform."* The trial court gave this requested instruction. (See instruction XIV. Record, pages

49 and 50, wherein plaintiff is referred to as a passenger).

Point II.

After all the evidence was in, and the counsel had argued the case and the court had instructed the jury, then for the first time counsel for the defendant (under his breath and in such a manner that the jurors could hardly hear, if they could hear at all) stated to the court that the plaintiff was a trespasser.

The instructions fully covered the law, even if the plaintiff were a trespasser. The defendant proposed no written instructions covering the liability of a common carrier to a trespasser, and the court fully covered the matter when he instructed, "All it did owe him (in such a case) was for itself and its servants to refrain from wilfully and purposely injuring the plantiff."

The portion of the instruction complained of when read with the whole instruction and also read in connection with all the instructions given (particularly instruction XV) is a correct statement of the law.

ASSIGNMENTS OF ERROR V AND VI.

These alleged errors are just as unmeritorious as the preceding ones. The court was more than

fair to the defendant. An instruction was given as follows:

> "Plaintiff must prove too by the fair preponderance of the evidence that while the defendant's train was at a standstill at Pacific City, plaintiff attempted to board said train, and while in the act of boarding same it was suddenly started by a jerk which threw plaintiff under the wheels of said train, causing the injury complained of * * *."

Said instruction was unfavorable to plaintiff, for a passenger may run to catch a car after the same is started and not be guilty of negligence as a matter of law. (*Eppendorf vs. Brooklyn City etc. R. R. Co.*, 69 N. Y. 195; 25 Am. Rep. 171).

The 26 written instructions covered the case fully and included the theory of the defendant's defense.

No authorities are necessary. The argument of the defendant is based upon a false premise. He assumes that the trial court did not instruct on his theory of the case. The court did instruct *on defendant's theory.*

THE ISSUE IN THE WHOLE CASE WAS WHETHER THE PLAINTIFF AS A PASSENGER HAD HOLD OF THE BARS OF THE CAR ABOUT TO ENTER OR WHETHER HE WAS RUNNING TO CATCH THE TRAIN AFTER THE VESTIBULE WAS CLOSED AND THE CAR WAS STARTED.

This issue was found by the jury in favor of the plaintiff.

AUTHORITIES.

For the convenience of the court we cite a few authorities as to the liability of a railroad toward a passenger:

> It is negligence to start a railroad train from a station while a passenger is actually getting on board, regardless of the length of the stop. *Texas & P. Ry. Co. vs. Gardner*, 114 F. 186, 52 C. C. A. 142.

> A person attempted to board a street car that had stopped at a usual place for stopping cars to take on passengers by taking hold of the hand rail and placing one foot on the platform step, when the car suddenly started up throwing him on the ground. *Held* to authorize a finding that the company was guilty of actionable negligence. *Wallen vs. Wilmington City Ry. Co.*, 61 A. 874; 5 Pennewill, 374.

> A street car company is liable to one injured by the car's starting while he was attempting to get on after it had stopped to take on passengers, although those in charge of the car had not seen him. *West Chicago St. R. Co. vs. James*, 69 Ill. App. 609.

Where plaintiff was injured by the sudden starting of a street car before he had succeeded in boarding it at a regular stopping place, and it appeared that at the time the conductor was not at his post of duty controlling the movements of the car, an instruction that such facts, if believed, were sufficient to establish the street car company's negligence was not error. *Clark vs. Durham Traction Co.*, 50 S. E. 518; 138 N. C. 77; 107 Am. St. Rep. 526.

It is the duty of the servants of a railroad in charge of a train to stop it a reasonable time to allow an intending passenger to board with safety. (Ky. 1904) *Mobile & O. R. Co. vs. Reeves*, 80 S. W. 471; 25 Ky. Law Rep. 2236. (Mo. App. 1905) *Lehner vs. Metropolitan St. Ry. Co.*, 85 S. W. 110; 110 Mo. App. 215. (Va. 1903) *Norfolk & A. Terminal Co. vs. Morris, Adm'x*, 44 S. E. 719; 101 Va. 422. (W. Va. 1905) *Normile vs. Wheeling Traction Co.*, 49 S. E. 1030; 57 W. Va. 132.

An attempt by a passenger to board a railway train will not as a matter of law be considered a negligent act, unless the attending circumstances so clearly indicate that he acted imprudently or rashly that reasonable minds could fairly arrive at no other conclusion, and that, in the absence of circumstances leading to such a conclusion, the question of whether the act of negligence should ordinarily be left to the jury. Sec. 1182 Hutchinson on Carriers.

Where a passenger is thrown from the step of a car, while attempting to enter it, by the starting of the car before he is safely on, the railroad company is liable for the injuries received. *Hatch vs. Philadelphia & R. Ry. Co.*, 61 A. 480; 212 Pa. 29.

It is the duty of a conductor, before giving a signal to start, to see that all passengers are safely on board, and failure in this respect is not excused by the fact that the conductor did not *actually see a passenger attempting to get aboard. Dudley vs. Front Street Cable Railway* (Wn. Case), 93 Fed 128.

Where a carrier fails to give intending passengers a reasonable opportunity to enter a car in safety before the train starts, the failure to do so resulting in injury to a passenger, the carrier is liable. *Giovanelli vs. Erie R. Co.*, 76 A. 424; 228 Pa. 33.

It is the duty of a street car conductor to know when he starts his car that no person attempting to board is at that moment with one foot on the platform and the other on the ground, with his hand on the railing or otherwise in a position of danger, it being his duty to look around and see that all passengers are safely aboard, the passengers not being required to foresee a sudden starting of the car. *Snipes vs. Norfolk & Southern R. R.*, 56 S. E. 477.

It is a carrier's duty to give passengers a reasonable opportunity to board a train; and the mere moving of the train, whether by an ordinary and usual, or an unusual and unnecessary, jerk, while the passenger is on the car steps, and before he has had a reasonable opportunity to reach a place of safety, whereby the passenger is injured, is negligence. *Chesapeake & O. Ry. Co. vs. Borders*, 131 S. W. 388; 140 Ky. 548.

A carrier of passengers, stopping its train to take on or discharge passengers, is bound to hold the same reasonable length of time, and,

in the absence of contributory negligence by a passenger, is liable for injuries resulting from a failure to do so. *Choctaw, O. & G. R. Co. vs. Burgess*, 97 P. 271.

Ordinarily it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, when the car is moving rapidly, or when the person is infirm or clumsy, or is incumbered with children, packages or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so, and a court might, upon undisputed evidence, hold as a matter of law that there was negligence in doing so. But in most cases it must be a question for a jury. Here there was nothing exceptional, and no reason apparent why plaintiff might not, with prudence, have expected to enter the car with safety. He had the right to expect that the speed of the car would continue arrested until he was safely on the car. It was the act of the driver in letting go the brake without notice, and thus suddenly giving the car a jerk while plaintiff was getting upon it, that caused the accident.

Upon all the evidence of this case it was for the jury to determine whether the plaintiff was chargeable with negligence, and whether such negligence contributed to the injury. *Eppendorf vs. Brooklyn City R. R. Co.*, 69 N. Y. 195; 25 Am. Rep. 171.

THIS WRIT WAS SUED OUT MERELY FOR THE PURPOSES OF DELAY.

April 15, 1915. An action was brought in the United States District Court on the cause of action sued on in this action.

May 3, 1915. Defendant moves to dismiss the action on the ground that the defendant was a New Jersey corporation and that the action should be brought in New Jersey by an alien.

May 24, 1915. Defendant, in the absence of the plaintiff and without plaintiff's knowledge took snap order of dismissal.

September 15, 1915. New suit filed in the Superior Court of the State of Washington against the defendant and John Doe, conductor.

January 14, 1916. Amended complaint filed by plaintiff. Defendant John Doe eliminated as a party.

January 26, 1916. Defendant files petition and bond for removal of said cause from Superior Court to the United States District Court, Western District of Washington, thereby bringing the case to the same court from which he had the same dismissed by snap order of May 24, 1915.

November 28, 1916. Plaintiff finally obtained a trial. Result was a disagreement.

Plaintiff could not obtain another trial until June 5, 1917, when he obtained a verdict.

Since the verdict the defendant has delayed so much that there is submitted herewith a motion to quash the bill of exceptions and affirm the judgment.

THE FOLLOWING FACTS OUGHT NOW TO BE CLEAR TO THE APPELLATE COURT.

I. That the plaintiff has been endeavoring for three years to obtain a final settlement of his case.

II. That the bill of exceptions was not filed within the term nor within the time allowed by the rules of the court. Therefore, it should be stricken.

III. The assignment of error on order overruling motion for new trial not only is without merit, but was only an excuse for the suing out of a writ of error.

IV. The assignment of error on alleged misconduct of counsel submits nothing for decision of this court.

V. The assignment of error on the instructions given or refused is frivolous.

Seven hundred years ago on the plains of Runny-

mede, Magna Charta was wrung from King John. In that great instrument the basic principle was laid down, "To none will we sell, to none will we deny, to none will we *delay right and justice.*" This extract from the charter contained a guaranty against the most prevalent abuses of the day.

The promises laid down in that document should be more strictly adhered to. Rule 30 of this court provides damages at a rate not exceeding ten per cent., in addition to interest, when an appeal or writ of error is sued out for the purposes of delay.

The appellate court should invoke said rule. If ever it should be applied, this is the proper case.

The plaintiff, crippled for life by reason of the defendant's negligence, has been kept from his due for three long years and justice and right have been delayed.

Respectfully submitted,

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